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BAJRANGI SINGH AND ANOTHER (PLAINTIFFS) *v.* MANOKARNIKA BAKHSH SINGH (DEFENDANT).

[On appeal from the Court of the Judicial Commissioner of Oudh, Lucknow.]

Hindu law—Widow—Power of widow in possession of husband's estate—Alienation of estate made by widow with concurrence of reversioners—Consent at time of alienation—Subsequent ratification—Quantum of consent necessary—Custom excluding daughters from succession, evidence of.

A Hindu widow in possession of her husband's estate as his heir has power, apart from legal necessity, to alienate the estate, with the concurrence of the reversionary heirs, so as to bind the persons who are the next reversioners when the succession opens out on her death; and this principle has been admitted by all the High Courts in India.

Nobokishore Sarma Roy v. *Hari Nath Sarma Roy* (1), *Marudamuthu Nadan* v. *Srinivasa Pillai* (2), *Vinak Vithal Bhange* v. *Govind Venkatesh Kulkarni* (3) and *Ramphal Rai* v. *Tula Kuari* (4) referred to.

The restriction sought to be placed by the Allahabad High Court on the widow's power to surrender in favour, or alienate with the consent, of presumptive reversioners so as to defeat the title of the actual reversioner at the time of the widow's death, is at variance with this principle, and not in accordance with the practice in other parts of India in which the Mitakshara law prevails.

Ramphal Rai v. *Tula Kuari* (4) dissented from so far as it supports such restriction.

Ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, although there may be cases in which special circumstances may render the strict enforcement of this rule impossible.

It is immaterial whether the concurrence of the reversioners is given at the time the alienation is made or whether the transaction is subsequently ratified. The maxim "*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur*," referred to.

Present:—Lord MACNAGHTEN, Lord DAVEY, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

(1) (1884) I. L. R., 10 Calc., 1102.
(2) (1898) I. L. R., 21 Mad., 123.
(3) (1900) I. L. R., 25 Bom., 129.
(4) (1883) I. L. R., 6 All., 116.

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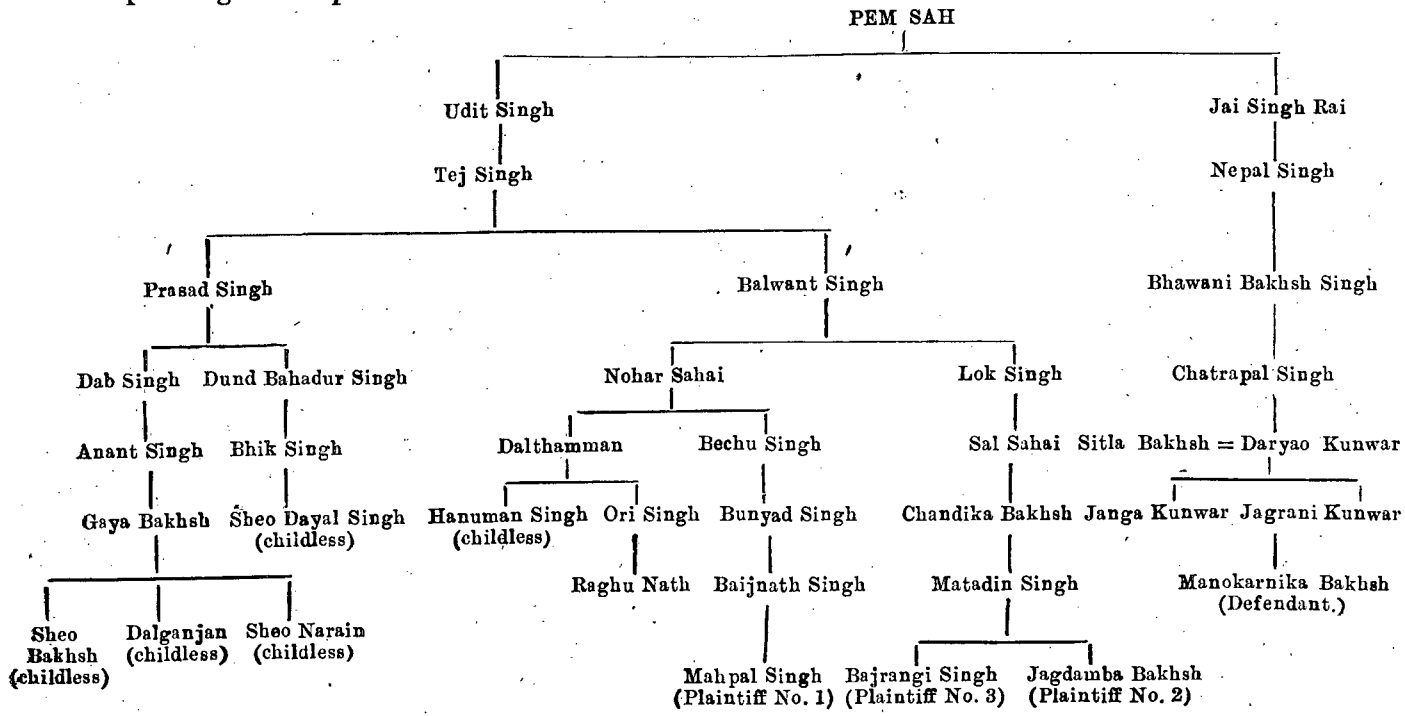
A custom among the Bhale Sultan tribe of Chhattris in Oudh excluding daughters from succession was held to have been established on the evidence.

APPEAL from a judgment and decree (March 6th 1900) of the Court of the Judicial Commissioners of Oudh, which affirmed a decree (January 23rd, 1899) of the Court of the District Judge of Rae Bareli dismissing the appellants' suit with costs.

The property in suit was an estate comprising certain villages situate in the District of Sultanpur. The appellants claimed to recover possession of the estate as the next heirs of one Sitla Bakhsh, who died prior to the annexation of Oudh leaving a widow Daryao Kunwar, and two daughters Janga Kunwar nd Jagrani Kunwar. On his death Daryao Kunwar succeeded to possession of the estate, and died on 6th August 1892: and the main question raised on this appeal was whether the appellants on her death became entitled to the immediate possession of the estate to the exclusion of the daughters and their issue. The respondent was the son of Jagrani Kunwar who married one Maheshar Bakhsh Singh.

During her lifetime Daryao Kunwar had made alienations of portions of the estate. On 21st October 1872 she sold the village of Surpur to Maheshar Bakhsh for Rs. 1,000; and on the same date she sold the villages of Miserpur and Mansahpur to the same person for Rs. 900 and Rs. 1,000 respectively. On 24th of July 1875 she sold the remaining portion of the estate to Maheshar Bakhsh for Rs. 9,000; and in pursuance of these deeds of sale the purchaser was on the death of Daryao Kunwar put into possession of the property and his name duly recorded in the revenue registers.

The following pedigree is material to explain the litigation which arose on the execution of the deeds of sale, and the pleadings in the present case.



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IN 1873 Matadin Singh the father of the appellants brought a suit against Daryao Kunwar for a declaration that the sale-deeds dated 21st October 1872 ought to be cancelled and set aside. That suit was eventually dismissed by the Court of the Judicial Commissioners on 6th May 1874. A suit of a similar nature instituted by Ganga Kunwar one of the daughters of Sitla Bakhsh was also dismissed on 25th August 1876.

Subsequently on 4th May 1877 some of the possible reversioners to the estate, including Baijnath Singh the father of Mahpal Singh, executed a deed by which they expressly ratified and confirmed the deeds of sale executed by Daryao Kunwar, and on 29th January 1878 a similar deed was executed by Janga Kunwar and by Matadin Singh the father of the appellants.

No dispute arose on the death of Daryao Kunwar, but after the death of Maheshar Bakhsh Singh on 23rd April 1893 disputes arose as to possession and the alteration of names in the revenue register. The Deputy Commissioner of Sultanpur by an order of 28th June 1893, directed the name of the respondent, Manokarnika Bakhsh Singh to be entered in the revenue records, and placed him in possession of the property in dispute: whereupon Mahpal Singh and Jagdamba Bakhsh Singh, on 17th February 1894 instituted the suit out of which the present appeal arose. By order dated 30th July 1895 Bajrangi Singh was added as a plaintiff and, Mahpal Singh having died pendente lite, the suit was continued by Jagdamba Bakhsh and Bajrangi Singh who were substituted on the record as representatives of Mahpal Singh.

The plaint, after stating the facts as above, alleged that the plaintiffs were the next heirs of Sitla Bakhsh Singh on the death of Daryao Kunwar; and it was pleaded that the deeds of sale executed by Daryao Kunwar in favour of Maheshar Bakhsh Singh were not under the circumstances binding on the reversioners, and that daughters and their issue were excluded from the succession by the custom of the Bhale Sultan tribe of Chhattris to which the parties belonged. The property claimed was not only the villages in dispute, but also certain movable property, and the relief sought was possession of the immovable and movable property with mesne profits and costs.

The defence was that the plaintiffs were not the next heirs to the estate; that the succession was governed by the ordinary Hindu Law and not by custom; that Daryao Kunwar took on her husband's death an absolute estate in all the property in suit; that the deeds of sale executed by her were binding on the plaintiffs, not only because of the circumstances under which they were executed, but also in consequence of the affirmance of the said deeds by the deeds executed by Baijnath Singh and Matadin Singh on 4th May 1877 and 29th January 1878, and that the suit was barred by limitation. As to the movable property the defendant set up a title under a will executed by Daryao Kunwar on 18th November 1887.

Issues were framed on which the District Judge in a preliminary judgment held that the suit was not barred by the deeds executed by Baijnath Singh and Matadin Singh on 4th May 1877 and 29th January 1878. The questions raised on the other issues so far as they are now material were (1) whether the suit was barred by limitation, and as to that the District Judge held that it was not; (2) whether the plaintiffs were the next reversioners; (3) whether a custom excluding daughters and their issue from inheriting had been proved, and (4) whether the sale deeds executed by Daryao Kunwar were binding on the plaintiffs.

As to the custom, after referring to the origin and derivation of the name of the Bhale Sultan tribe of Chhattris and the districts in which they were mostly located, for which the Sultanpur Settlement Report, 1873, page 179, paras. 367, 368 and 370, and the Gazetteer of Oudh, Ed. 1877, Vol. II, pages 91 and 92 were cited, the District Judge said :—

"The plaintiffs seek to establish custom in this Bhale Sultan clan of Sultanpur that when in a separated family a man dies with only a daughter or daughter's issue, and no son, the female line cannot succeed, collateral male heirs being preferred. I take this to deal with the Thakur or Chhattri branch only, not with bhaibands of the Khanzadas or converted Thakurs who vicariously adopt Mussalman and Hindu customs. The custom set up by the plaintiffs as pertaining to the Bhale Sultans is contrary to the established rules of Hindu succession of the Mitakshara school, where in a separated Hindu family succession is in favour of female issue in preference to male collaterals. To prove their case the plaintiffs offer evidence of two classes : (1) there is the documentary evidence offered by the settlement wajib-ul-arz filed : (2) there

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is a vast quantity of oral evidence offered. The defendant offers evidence of both classes to rebut, but in that the onus rests in the first instance on the plaintiffs."

After examining the 21 wajib-ul-arzes filed by the plaintiffs and rejecting 14 of them the District Judge said :—

"In the seven villages of which I have accepted the wajib-ul-arzes as fairly reliable I must hold these wajib-ul-arzes as by no means adding weight to the prevalence of the custom. The nature of the conditions, the language in which they are expressed convey to me the view that the men at whose dictation the documents were drawn up were all more or less uncertain about there being any definite rules or customs regarding Bhale Sultan succession. The custom as evidenced by them is not clear and unambiguous."

After a lengthy consideration of the oral evidence of many witnesses, 33 of whom gave instances of the custom, the District Judge came to the conclusion that there were very few instances of which there was any sort of corroboration and they were not sufficiently reliable to prove the custom set up. He was of opinion on the whole evidence of the custom

"that it has not been clearly established that in the Bhale Sultan clan of Chhattris there is any such custom by which the daughters and their issue are, in a separated family, excluded from inheriting. The plaintiffs are not therefore heirs in preference to the daughters, who are the lega heirs."

On the question of the plaintiffs being the next reversioners, the District Judge considered, on the evidence given as to the pedigree, that, besides the daughters, there were other heirs nearer than the plaintiffs.

He also held that Daryao Kunwar did not take an absolute estate in the property of her husband, but only the ordinary estate of a Hindu widow; that there was no legal necessity shown for her to alienate the property, and that she was not entitled to transfer the immovable property by the sale-deeds of 21st October 1872 and 24th July 1875, which were therefore not binding on the plaintiffs.

The District Judge therefore made a decree dismissing the suit with costs.

On appeal the Court of the Judicial Commissioners (MR. J. DEAS, Judicial Commissioner, and Mr. G. T. SPANKIE, Additional Judicial Commissioner) found that of the instances of the custom given by the plaintiffs' witnesses 20 were proved; and that of the wajib-ul-arzes the seven which had been accepted by the

District Judge as of some, though not sufficient, value were also strong evidence of the alleged custom, which they considered was established by the evidence. They were of opinion that the plaintiffs were the next reversioners on the death of Daryao Kunwar; and that the deeds of sale executed by her were under the circumstances valid and binding on the plaintiffs; thus coming to conclusions on every point contrary to those arrived at by the District Judge, but leading to the same result, *viz.* the dismissal of the suit. The material portions of the judgment of the Judicial Commissioners on the points in issue were as follows:—

"According to the Thauri *wajib-ul-arz* 'a daughter or her issue do not *alal-umum* obtain the share.' According to the Dadra *wajib-ul-arz* and that of Kuchit 'a daughter is excluded *alal-umum* from the share.' According to the Dharauli *wajib-ul-arz* 'a daughter *alal-umum* (and) a widow without issue, provided that her husband lived and ate jointly with other co-sharers, do not obtain the share.' According to the Dichauli *wajib-ul-arz* 'a daughter or her issue do not *alal-umum* obtain the share.' According to the Gajanpur *wajib-ul-arz* 'a daughter is excluded *alal-umum* from her father's share.' According to the Dahriawan *wajib-ul-arz* 'a daughter and her issue and illegitimate issue do not obtain the share.'

The 'share' referred to in all these cases in connection with the daughter is the share of her father. The general objections are that the word '*alal-umum*' means 'generally' 'as a general rule,' that is to say, not invariably, not universally; that the exclusion of the daughter may have reference to her exclusion in cases in which her father was a member of a joint family, and that the administration papers do not agree as to certain customs and therefore there is no definite and certain custom of succession. It was contended for the plaintiffs that the word '*alal-umum*' means 'universally', 'without exception.'

"We were not referred to any books as to the meaning of the word '*alal-umum.*' The word is derived from the Arabic word '*am,*' which means 'commonly,' 'generally.' As far as I can discover *alal-umum* means 'commonly,' 'generally,' and not 'universally.' It seems to me, however, that if the meanings 'commonly' or 'generally' are attached to the word, the value of the administration papers is not much affected, having regard to the fact that the defendant has not proved a single instance in which a daughter inherited the share of her deceased father. It seems to me that the argument that the exclusion of daughters may have reference to their exclusion where there is a joint family, has no force. There was no necessity for providing for their exclusion in such a case, as the Hindu Law excludes them. The object of the administration papers was to record customs varying the Hindu Law, not to record the Hindu Law. I think that the circumstances that the administration papers do not agree on such points as the power of the widow to adopt, or to alienate, or as to the mode of partition among the

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sons, or as to the right of the eldest son, on partition, to a larger share than his brothers, or as to the extent of the share he should take, or that some of the administration papers are silent on some of these points, do not affect the value of the seven administration papers in question. All the administration papers are consistent as to the exclusion of daughters. All the matters above mentioned cannot be deemed to constitute a custom of succession, so that it can be said that as there is not uniformity with respect to them, therefore there is no custom as to the daughters which is definite and certain. I also think that the circumstance that none of the seven administration papers in question relate to the property in suit, does not affect their value The custom set up is a tribal one. The circumstance that the administration papers of the villages in suit do not set forth the custom in dispute or indeed any custom is explained. They were prepared when Daryao Kunwar was in possession of the property. They are clearly 'concoctions' of hers. No weight can be attached to them as rebutting the evidence produced by the plaintiffs to prove the alleged custom. I think that considerable weight should be attached to the seven administration papers in question as evidence of the alleged custom.

"As to the statements made by the pleader for Daryao Kunwar and Maheshar Bakhsh Singh in the suit brought against them by Janga Kunwar, they are not, I think, admissible in evidence under section 18, Indian Evidence Act, as admissions. No doubt the defendant derives his interest in the subject-matter of the suit from his father and Daryao Kunwar, but the statements did not qualify or affect the title of those persons to that property.

"All the instances which I consider proved, may not be of the same value, but they all are, I think, consistent with, and evidence of, the existence of the alleged custom. In all the custom was set up. In some its existence was challenged, but subsequently the custom was submitted to. In most of those in which it was not set up and its existence was not challenged, there is no explanation offered as to why the person who was entitled to the property if the custom did not exist, did not claim it. In some instances the title of the person setting up the custom was open to dispute, at the time of the suit, limitation not having expired, and in others the property was of small value. Neverthless the custom was set up. Then there are the administration papers which the District Judge thought deserving of consideration and to which I think considerable weight should be attached. There are also the opinions of a considerable number of Bhale Sultan Chhattris in favour of the existence of the custom. The evidence of some of the witnesses for the defendant goes to show the existence of the custom. On the other side there is no evidence to show that the custom does not exist. I think that it is proved that a custom does prevail among the Bhale Sultan Chhattris in the Sultanpur District by which a daughter is excluded from inheriting the property of her deceased father, and her sons are also excluded from inheriting their maternal grandfather's property. . . . . ."

As to the validity of the transfer by Daryao Kunwar, after stating that it had not been shown that prior to the confiscation

after the rebellion in Oudh, of all proprietary rights in property Daryao Kunwar had acquired an absolute right to the property in dispute and that therefore the contention that the effect of the settlement of the property with her at the first regular Settlement was to restore her to such absolute right, failed, and she must be deemed to have held the property as a Hindu widow, the Judicial Commissioner's judgment proceeded:—

"On behalf of the defendant it is contended that the transfers having been assented to by Matadin Singh and Baijnath Singh and by other reversionary heirs, and for consideration, they had the effect of conveying an absolute title to the father of the defendant. The following cases were referred to, *Rajkristo Roy* v. *Kishoree Mohan Mojoomdar* (1), *Mohunt Kishen Geer* v. *Busgeet Roy* (2), *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (3), *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (4), *Noferdoss Roy* v. *Modhu Soondari Burmonia* (5), *Sia Dasi* v. *Gur Sahai* (6), *Ramadhin* v. *Mathura Singh* (7), *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (8), *Lala Parbhu Lal* v. *Mylne* (9) and *Behari Lal* v. *Madho Lal Ahir Gyawal* (10).

"Looking at the Settlement pedigree (exhibit A22) it will be seen that of the reversionary heirs who executed the deeds, Hanuman Singh and Sheo Dayal Singh were four degrees removed, and Sheo Bakhsh Singh, Sheonarain Singh, Baijnath Singh and Matadin Singh were five degrees removed from Jai Singh, the common ancestor of themselves and Sitla Bakhsh Singh. There do not appear to have been any other reversionary heirs alive at the time of the transfers, superior in degree to Hanuman Singh and Sheodayal Singh or equal in degree to Sheo Bakhsh Singh, Sheonarain Singh, Baijnath Singh, and Matadin Singh, or indeed any other reversionary heirs at all in the line of Jai Singh Rai.

"In the case of *Nobo Kishore Sarma Roy* v. *Hari Nath Sarma Roy* (8) a Full Bench of the Calcutta High Court decided that, under the Hindu Law current in Bengal, a conveyance by a widow upon the ostensible ground of legal necessity, such conveyance being assented to by the person who at the time is the next reversioner, will conclude another person, not a party thereto, who is the actual reversioner upon the death of the widow, from asserting his title to the property. It would seem that three of the Judges at least, who were members of the Full Bench, including Garth, C. J., and Pigot, J., came to this conclusion not because they did not doubt its soundness, but because it was supported by a long course of authority in the Court and to decide otherwise would have the effect of disturbing a great number of titles. In the case of *Ram Chunder Poddar* v. *Hari Das Sen* (11) Garth, C. J., and

(1) (1865) 3 W. R., 14.
(2) (1870) 14 W. R., 379.
(3) (1861) 8 Moo. I. A., 529, at page 551.
(4) (1869) 13 Moo. I. A., 209, at page 228.
(5) (1880) I. L. R., 5 Calc., 732.
(6) (1880) I. L. R., 3 All., 362.
(7) (1888) I. L. R., 10 All., 407.
(8) (1884) I. L. R., 10 Calc., 1102.
(9) (1887) I. L. R., 14 Calc., 401, at page 418.
(10) (1891) L. R., 19 I. A., 30; I. L. R., 19 Calc., 236.
(11) (1882) I. L. R., 9 Calc., 463.

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Field, J., doubted the soundness of the principle upon which the decision in *Nobo Kishore Sarma Roy's* case is based, and Pigot, J., did so in *Gopeenath Mookerjee* v. *Kally Doss Mullick* (1). In *Ramphal Rai* v. *Tula Kuari* (2) a Full Bench of the Allahabad High Court disapproved of the principle. I agree with Pigot, J., that there seems to be no answer to Mr. Mayne's argument in justice. That argument will be found at the commencement of section 592 of Mr. Mayne's Work on Hindu Law (4th Edition). At the same time the proposition that in a case which would not otherwise justify a sale by a Hindu widow, the transaction will be rendered valid by the consent of the reversionary heirs, seems to have the authority of the Judicial Committee of the Privy Council. On a consideration of the cases cited it appears to me that a conveyance by a widow made with the consent of all the heirs of her husband living at the time, will conclude a person not living at the time who may be the heir of the husband at the time of the widow's death. In this view, if the transfers by Daryao Kunwar in favour of Maheshar Bakhsh Singh had been executed by Sheo Bakhsh Singh, Sheonarain Singh, Sheodayal Singh, Baijnath Singh, Hanuman Singh and Matadin Singh, or those persons had at that time in any other manner signified their consent to such transfers, such transfers would be valid as against the plaintiffs even if there were no legal necessity for them. Those persons did not at the time of the transfers signify their consent to them. They did so subsequently by the 'deeds of agreement' dated respectively the 4th May 1877 and 29th January 1878. The question then arises as to what the legal effect of the transfers, taken with the deeds of agreement, is.

"It was not disputed that the executants of these deeds received consideration for ratifying the transfers and agreeing not to dispute their validity. Indeed it was said that they were paid to execute the deeds. It was argued that they had mere contingent reversionary interests in expectancy and such interests could not be released or relinquished. It seems to me that the argument does not touch the point, which is, whether the effect of the transfers, taken with the deeds of agreement, is the same as if the executants of those deeds had joined Daryao Kunwar in transferring the property or had at the time of the transfers consented to them. I am unable to see any distinction between the two cases. It seems to me that the transfers, when ratified by the reversionary heirs for consideration, have the same effect as if the reversionary heirs had joined in making the transfers or had consented to them at the time they were made. I am of opinion, therefore, that the transfers having been ratified for consideration by the reversionary heirs, are valid as against the plaintiffs and Mahpal Singh, who were not reversionary heirs at the time the deeds of agreement were executed, even if there were no legal necessity for them. Further, I think, that the questions as to whether Daryao Kunwar understood the nature of the transfers, or as to whether the transfers were colourable do not arise. If they do, the plaintiffs were bound to give some proof that the transfers would not be binding

(1) (1883) I. L. R., 10 Calc., 225. (2) (1883) I. L. R., 6 All., 116.

[redacted], or that they were colourable, and they have given [redacted]

[redacted]h, therefore, I think that at time when Daryao Kunwar died, [redacted] were the heirs of her husband; that Daryao Kunwar was in [redacted] property in dispute as a Hindu widow, and that the plain- [redacted]at by custom the property of a Bhale Sultan Chhattri [redacted]ral male kindred, notwithstanding his daughter or [redacted]et as I think that the sales of the property in suit [redacted]dant's father are valid as against the plain- [redacted] [redacted] the appeal fails. I would therefore dismiss it with costs and confirm the decree of District Judge."

On this appeal it was contended that the appellants were the next reversioners.

G. E. A. Ross for the appellants contended that the Court of the Judicial Commissioner was in error in holding that the transfers of the property in suit made by Daryao Kunwar were valid as against the plaintiffs and had wrongly decided that as the deeds had been ratified by the then reversionary heirs they were binding on the appellants even though they were executed without any legal necessity. A Hindu widow did not take an absolute estate: the restrictions on her power to alienate the property inherited from her husband, in which she had only a special and qualified estate were such as to prevent her from disposing of it (unless such dispositions were clearly conducive to the spiritual welfare of her husband, or were for other religious or charitable purposes) in the absence of any legal necessity, in such a manner as to bind the collateral heirs of her husband. Reference was made to *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (1). In the present case no legal necessity was shown or even alleged, therefore the alienations were not binding. As to the power of the widow to alienate the estate with the consent of the reversioners the cases cited by the Judicial Commissioners in support of it were all cases in which the widow made the alienation after obtaining the reversioners' consent. Here the widow made the alienations without any such consent, and they were ratified some years subsequently by only some of the reversioners who were not the present claimants to the estate, and who, it was submitted, could not bind the appellants by any agreement come to between themselves and the widow. Reference was made to *Bahadur*

(1) (1861) 8 Moo., I.A., 529.

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Singh v. *Mohar Singh* (1), where it was contend[ed] persons claiming as heirs of the husband on the dea[th] widow were estopped by an arrangement made by f[ellow] sionary heirs with the widow, and their Lo[rdships] Judicial Committee said:—"This argument fa[ils] in law. There is no evidence of any repres[entation] found an estoppel; and even assuming th[at] amounted to a contract be[tween] the then claima[nts] a contract is not bind[ing] e appellants. Accord[ing] to Indian law the claimants [in 1]47 were but expectant heirs with a *spes successionis*. The app[ellants] claim in their own right as heirs of Moha[n] when the succession opened, and it would be a novel proposition to hold that a person so [claim]ing is bound by a contract made by every person through whom [he] traces his descent." *Bhagwanta* v. *Sukhi* (2) and Mayne's Hindu [Law] 7th Ed., 855: 6th Ed., 637, 638 were referred to. The case of *Kishore Sarma Roy* v. *Hari Nath Sarma Roy* (3) referred to by [the] in that passage, which was a case cited before the Judicial [Com]mittee in the case of *Bahadur Singh* v. *Mohar Singh* (1) only applied. it was contended, when the full body of the reversioners consented to the alienation. In the present case only some of the heirs ratified the transfers made by the widow. The present appellants therefore suing as they did as the next reversioners in existence at the time the succession opened out, were not barred by any disclaimer of reversionary rights claimed by their ancestors.

On the question whether the custom as to the exclusion of daughters was established by the evidence, on which the courts below differed, the cases of *Lekraj Kuar* v. *Mahpal Singh* (4), *Uman Parshad* v. *Gandharp Singh* (5) and *Lali* v. *Murlidhar* (6) as to the value of a wajib-ul-arz as evidence of custom, were cited; and the Evidence Act (I of 1872), section 32, clause (4) as to the admissibility of statements of deceased persons as to a custom, and section 48 as to the relevancy of the knowledge of

(1) (1901) L. R., 29 I. A. 1 (8); I. L. R., 24 All., 94 (107) (108).
(2) (1899) I. L. R., 22 All., 33.
(3) (1884) I. L. R., 10 Calc., 1102.
(4) (1879) L. R., 7 I. A., 63: I. L. R., 5 Calc., 744.
(5) (1887) L. R., 14 I. A., 112: I. L. R., 15 Calc., 20.
(6) (1906) L. R., 33 I. A., 97: I. L. R., 28 All., 488.

such persons as to the existence of the custom were also referred to.

DeGruyther for the respondent contended that on the evidence the alleged custom excluding daughters from succession was not established. But he chiefly relied upon the decision of the Judicial Commissioners that Daryao Kunwar had power to alienate the absolute estate with the consent of the reversioners; and that therefore the appellants were bound by the deeds of sale executed by her in favour of Maheshar Bakhsh Singh. That she was able to surrender her interest in the estate to the next heir of her husband was decided in the case of *Jadamoney Dabee* v. *Saroda Prosono Mukerjee* (1), which was considered settled law. Whether she could part with the absolute estate, only depended upon the concurrence of her husband's heirs: if they consented, the alienation was valid without proof of any legal necessity for it. Reference was made to *Rany Srimuty Dibeah* v. *Rany Koond Luta* (2), *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (3), *Raj Lukhee Debea* v. *Gokool Chunder Chowdhry* (4), *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (5) and *Behari Lal* v. *Madho Lal Ahir Gyawal* (6). These cases were all based on the principle that a Hindu widow had a right to relinquish the estate if she wished. And it was submitted that whether the heirs consented at the time of the alienation or ratified the transaction subsequently was immaterial. Here it was found by the appellate court that all those heirs interested in the estate as next reversioners ratified the transfers executed by the widow.

Ross replied.

31*st October* 1907:—The judgment of their Lordships was delivered by SIR ANDREW SCOBLE:—

Sitla Bakhsh Singh, a Hindu of the tribe of Bhale Sultan Chhattris, resident in Sultanpur, died some time before the annexation of Oudh, leaving him surviving a widow named Daryao Kunwar, and two daughters, Janga Kunwar and Jagrani Kunwar. He was absolute owner of an estate known as Pindara Karnai and other property, which at his death passed to his

(1) (1856) Boulnois, 120.
(2) (1847) 4 Moo., I. A., 292.
(3) (1861) 8 Moo., I. A., 529 (550, 551).
(4) (1869) 13 Moo., I. A., 209 (228).
(5) (1884) I. L. R., 10 Calc., 1102.
(6) (1891) L. R., 19 I. A., 30 : I. L. R., 19 Calc., 236.

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widow, and, at her death, would have passed to his daughters, but for a custom of the tribe excluding daughters and their issue from succession. The widow died on the 6th of August 1892, having previously sold the whole of the estate to her son-in-law Maheshar Bakhsh Singh, the husband of her daughter Jagrani Kunwar, and mutation of names in the Revenue Registers was effected in his favour. After the death of Maheshar, which occurred on the 3rd of April 1893, the name of his son, Manokarnika Bakhsh Singh, the present respondent, was entered in the Government Records as proprietor of the estate; and the present appellants (with one Mahpal Singh, who died while the case was pending) brought the suit now under appeal, claiming that, by reason of the custom of the Bhale Sultan Chhattris, they were the next heirs in reversion to the estate of Sitla Bakhsh.

In the Courts below and before their Lordships two main questions were raised. First, whether the custom had been proved; and, secondly, whether certain deeds confirming the sales by the widow to Maheshar, executed by the then nearest reversioners, and disclaiming all title to the property in dispute, were binding on their descendants, the appellants, who were the nearest reversioners at the time when the succession opened, at the widow's death. In the Courts in India, the District Judge held the custom not proved and the deeds not binding; the Judicial Commissioner came to the exactly opposite conclusion on both points. The conflict of opinion in the Courts in India upon the question of custom has made it necessary for their Lordships to examine carefully the evidence in this case, in order to ascertain whether the alleged custom has been satisfactorily proved. In making this examination, their Lordships have been materially assisted by the elaborate analysis of the evidence made by both the learned Judges below, and by the learned counsel who argued the appeal. They will briefly state the grounds on which they consider that the judgment of the Judicial Commissioner on this point must prevail.

The Bhale Sultan clan appear to have derived their name, some three centuries ago, from their warlike exploits in the service of the Emperors of Delhi. They are now settled in considerable numbers in the district of Sultanpur in Oudh, in several

villages, in which they constitute the bulk of the population. In the language of the Indian Evidence Act, 1872, (section 48) they form a "considerable class of persons." The evidence in support of the custom was mainly oral, and no document was produced of an earlier date than the British annexation. Thirty-five witnesses were examined on behalf of the appellants. They were all members of the Bhale Sultan clan, mostly men of mature age and of good position. They all gave evidence that in their clan it was the custom that daughters and their issue were excluded from succession to the separated estate of their father, and put forward thirty-nine instances in which this exclusion had taken place. The Judicial Commissioner held that twenty of these instances had been satisfactorily proved. For the respondent no evidence was given in contradiction of these instances, though ample time was allowed for the production of such testimony had it been available; but six witnesses were called, one of whom had signed a *wajib-ul-arz* in which the custom was set up, and two gave evidence in support of the custom.

In corroboration of the oral evidence, a number of village administration papers (*wajib-ul-arz*) were produced, of which seven were admitted by both Courts to be relevant, as relating to Bhale Sultan villages. In all these the rule is stated that a daughter and her issue do not *alal-umum* (that is, as a general rule) obtain the share. One of them is attested by 44 zamindars and lambardars of the village, another by 49, others by 8 or 10. The dates of these documents are not given, but they were all officially recorded prior to the institution of this suit, and quite independently of the parties thereto.

One other piece of evidence remains to be noticed. It has been stated that Sitla Bakhsh left two daughters, Janga Kunwar and Jagrani Kunwar. In 1876, Janga Kunwar filed a suit against her mother Daryao Kunwar and her brother-in-law Maheshar Bakhsh for a declaratory decree that she was entitled to succeed to half her father's estate; and in answer to her claim, the vakil for the defendants put forward the plea that "among Bhale Sultans a daughter never succeeded to the inheritance of her father." The Court came to no decision on the point, but

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disposed of the suit on another ground, reserving Janga Kunwar's right to put forward her claim on the death of her mother. The fact, however, that this defence was raised shows that the existence of the custom was present to the mind of Daryao Kunwar at the date of the transactions to which their Lordships will now proceed to refer.

Although Daryao Kunwar appears to have been willing to invoke the custom as a defence against the claim of her unmarried daughter, she was at the same time endeavouring to defeat the operation of the custom in regard to her married daughter, Jagrani Kunwar, and her husband, Maheshar Bakhsh Singh, the father of the present respondent. During the period from 21st October 1872 to 24th July 1875, she executed five deeds of sale, by which she purported to transfer, for valuable consideration, successive portions of her husband's property to Maheshar Singh. The District Judge has found that these deeds were executed without "legal necessity;" and it is certain that the preliminary consent of her husband's reversionary heirs was not obtained. One of these heirs, Matadin Singh, the father of the appellants Jagdamba Singh and Bajraugi Singh, brought a suit in the Court of the Deputy Commissioner of Sultanpur in 1873 to set aside three of the deeds; but on appeal this suit was dismissed on a technical ground by the Judicial Commissioner on the 6th May 1874. Janga Kunwar's suit, already referred to, was dismissed on the 25th August 1876. Having thus succeeded, for the time being, in the Courts, Daryao Kunwar entered into negotiations with the persons who were at that time admittedly the nearest reversionary heirs to her husband's estate, and obtained from them two documents, called deeds of relinquishment, one dated the 4th May 1877 and the other dated the 29th January 1878. The first of these was signed by five persons, four of whom died without issue in Daryao Kunwar's lifetime, and the fifth, Baijnath Singh, is the father of the plaintiff Mahpal Singh, who died while this suit was pending in the Court of the District Judge, and who is now represented by the appellants. The second was signed by Janga Kunwar, Matadin Singh (the father of the present appellants), and Hanuman Singh, who is still living, but is not a party to this suit. In these documents,

which are identical in terms, after enumerating the sales by Daryao Kunwar to Maheshar Singh, the executants go on to say:—

"We all have given our full consent to all those sale-deeds which the Thakurain has executed in favour of the Babu, and will ever remain so satisfied. And after the death of the Thakurain we shall bring no claim against the Babu on account of the movable and immovable property owned by her; hence we have executed this deed of agreement so that it may serve as an authority, and be of use in time of need."

"It was not disputed," says the Judicial Commissioner in his judgment, "that the executants of these deeds received consideration for ratifying the transfers and agreeing not to dispute their validity. Indeed it was said that they were paid to execute the deeds." Upon these facts, the Judicial Commissioner found that the transfers to Maheshar Singh were valid, and dismissed the appeal.

The restrictions imposed by the Hindu law upon the widow's power to alienate her deceased husband's estate have frequently been the subject of consideration by this Committee.

"For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity. On the other hand it may be taken as established that an alienation by her which would not otherwise be legitimate may become so if made with the consent of her husband's kindred." *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*, (1).

"The kindred in such case," their Lordships observe in a later case, "must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events, there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one, and one justified by Hindu law." *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*, (2).

Upon the practical application of this general principle there has been much discussion in the High Courts in India. A Full Bench of the High Court at Allahabad, in the case of *Ramphal Rai* v. *Tula Kuari* (3) considered that:—

"The plain principle deducible from these rulings of the Privy Council is that in order to validate an alienation by a Hindu widow of her deceased husband's estate for purposes other than those sanctioned by the Hindu law,

(1) (1861) 8 Moo., I. A., 529, at p. 551. (2) (1869) 13 Moo., I. A., 209, at p. 228.

(3) (1883) I. L. R., 6 All., 116.

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it must have the consent of all those among his kindred who can reasonably be regarded as having an interest in questioning the transaction."

And they accordingly held that the consent of the heir presumptive to an alienation by a widow was not sufficient to defeat the rights of a more remote reversioner, and that an assignment by the widow to the heir presumptive had no greater effect in her favour than it would have had if he had been a stranger.

"We think," say the learned Judges, "that the spirit of the Hindu law is to keep the right of succession to the deceased husband's estate open until the widow's death, free of any control by her, except in such cases as she has a power to adopt; and that no reversioner possesses such a present vested interest as enables him to combine with her in defeating his co-reversioners. In other words, her right and theirs have one common basis, that of survivorship to the widow, and it is incapable of anticipation."

The High Court of Calcutta has taken a different view, based upon a long current of authority in that Court, albeit two of the learned Judges—Garth, C. J., and Pigot, J.—considered that the principles on which the decision was founded were open to great objection. In the case of *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (1) a Full Bench held that under the Hindu law current in Bengal—

"A transfer or conveyance by a widow upon the ostensible ground of legal necessity, such transfer or conveyance being assented to by the person who at the time is the next reversioner, will conclude another person not a party thereto, who is the actual reversioner upon the death of the widow, from asserting his title to the property."

The ground of the decision is thus shortly stated by Garth, C. J.:—

"If it is once established as a matter of law that a widow may relinquish her estate in favour of her husband's heir for the time being, it seems impossible to prevent any alienation which the widow and the next heir may agree to make."

And more fully by Mitter, J.:—

"Whatever conflict there may be upon the question whether a Hindu widow may sell the whole inheritance without any legal necessity, merely with the consent of the next male heir, there is no conflict in the decisions, since the case of *Jadamoney Dabee* v. *Saroda Prosono Mookerjee* (2) was decided in the late Supreme Court of Calcutta, upon the question whether the relinquishment by a Hindu widow of her estate to the next male heir of her husband is valid or not. Such relinquishment by the widow has been held for a long series of years to be valid. . . . But if the widow is competent to relinquish her estate to the next male heir of her husband, it follows as a logical

(1) (1884) I. L. R., 10 Calc., 1102. (2) (1856) 1 Boulnois, 120.

consequence, that she can alienate it merely with his consent without any legal necessity."

In a subsequent case—*Radha Shyam Sircar* v. *Joy Ram Senapati*, (1)—the same High Court held that the consent must be of the whole body of persons constituting the next reversion.

The Calcutta decision, of course, is not binding upon other High Courts, but it has been followed in Madras. In the case of *Marutamuthu Nadan* v. *Srinivasa Pillai* (2) decided by a Full Bench of the Madras High Court in 1898, Subramania Ayyar, J., says :—

"I think it unnecessary to go into the question whether the Hindu law, according to the texts or the commentaries, lends support to the doctrine that a female holding a qualified estate can validly surrender such an estate so as to entitle the then immediate reversioner to enter upon the inheritance and to hold it absolutely as if the succession had opened by the natural or civil death of the qualified owner. Though there has been no course of decisions on the point in this Presidency as in Bengal, yet instances have occurred which show that parties have acted upon the view that such surrenders are valid in these parts as well. This appears even from some of the cases which have come before the Court. Since there is nothing in the doctrine itself which makes it less suited to the community in this Presidency than to the community in Bengal, it is not surprising that the Calcutta rulings have in practice been followed in this Presidency also. In such circumstances the rule as stated by the Judicial Committee in *Behari Lal* v. *Madho Lal* (3) should, I think, be taken to be a rule applicable to this Presidency too, subject, no doubt, to the restriction pointed out by their Lordships, *viz.*, that the surrender should be absolute and complete, and that the whole limited estate should be withdrawn, a restriction that would guard against the injurious results which would follow if the rule were not so qualified."

The question was also considered by the High Court of Bombay in 1901 in the case of *Vinayak Vithal Bhange* v. *Govind Venkatesh Kulkarni* (4). In the course of his judgment Jenkins, C.J., says (at p. 133) :—

"There can be no question that, apart from legal necessity, a widow can validly alienate land that has devolved upon her from her husband with the consent of the reversioner. The basis on which this rests is a matter of controversy. The High Court of Calcutta on the whole appears to favour the view that the consent derives its effect from the power supposed to reside in a widow of accelerating, by the surrender of her own interest, the interests of the reversioners. It is impossible not to feel some

(1) (1890) I. L. R., 17 Calc., 896.
(2) (1898) I. L. R., 21 Mad., 128.
(3) (1891) L. R., 19 I. A., 30 I. L. R., 19 Calc., 236.
(4) (1900) I. L. R., 25 Bom., 129.

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difficulty as to this doctrine. . . . . The other view is that the consent of the persons interested to oppose the transaction evidences its propriety, if not its actual necessity. This has a parallel in the law relating to a widow's adoption under certain circumstances, and it finds support in the texts. . . . This view has too, in a measure, the sanction of the Privy Council."

And he quotes the cases of *Collector of Masulipatam* v. *Cavaly Vencata Narrainxpah* (1) and *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (2) which have been already referred to. "Turning then to Bombay," he goes on to say, "the High Court here appears to have accepted this view rather than that which finds favour in Calcutta." In the same case Ranade, J., observes (at p. 139):—

"The Bengal theory that the widow's interest was a life interest, and that her surrender or release of that interest to the next reversioner accelerates his obtaining the full title has never met with much acceptance on this side of India. Our leading case—*Varjivan Rangji* v. *Ghelji Gokaldas*, (3)—lays down that the consent must be of all the kindred, but that does not mean that every single member who is a kindred must actually join in the conveyance."

And the conclusion to which he comes is that, in order to validate an alienation by a widow otherwise than from legal necessity

"The consent of the reversioners must be of such kindred the absence of whose opposition raises a presumption that the alienation was a fair and proper one."

The principle being thus admitted by the High Courts in India, the question of the *quantum* of consent necessary only remains. The High Court of Allahabad, indeed, does not recognize the validity of surrenders in favour, or alienations with the consent, of presumptive reversioners, so as to defeat the title of the actual reversioner at the time of the widow's death. But this restriction is at variance with the principle itself, and is not in accordance with the practice in other parts of India in which the Mitakshara law prevails. Their Lordships have not been referred to any cases in the Province of Oudh in which this restriction has been acted upon; and though they would be unwilling to extend the widow's power of alienation beyond its present limits, they cannot adopt the further limitation which the Allahabad High Court has sought to establish. They agree with the High

(1) (1861) 8 Moo., I. A. 529. (2) (1869) 13 Moo., I. A. 209.
(3) (1881) I. L. R., 5 Bom., 563.

Court of Calcutta—*Radha Shyam Sircar* v. *Joy Ram Senapati* (1)—that ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible.

Applying this rule to the case now under consideration, the Judicial Commissioner has found that "of the reversionary heirs who executed the deeds, Hanuman Singh and Sheo Dayal Singh were four degrees removed, and Sheo Bakhsh Singh, Sheo Narain Singh, Baijnath Singh, and Matadin Singh were five degrees removed from Jai Singh, the common ancestor of themselves and Sitla Bakhsh Singh. There do not appear to have been any other reversionary heirs alive at the time of the transfers superior in degree to Hanuman Singh and Sheo Dayal Singh or equal in degree to Sheo Bakhsh Singh, Sheo Narain Singh, Baijnath Singh, and Matadin Singh, or indeed any other reversionary heirs at all in the line of Jai Singh Rai." Their Lordships agree with the Judicial Commissioner that the consent of these persons was sufficient, and that it is immaterial that it was given after the execution of the deeds. *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.* The appellants who claim through Matadin Singh and Baijnath Singh must be held bound by the consent of their fathers.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed and the decree of the Judicial Commissioner dated the 6th March 1900 confirmed. The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants :—*Barrow, Rogers and Nevill.*

Solicitors for the respondent :—*Watkins and Lempriere.*

J. V. W.

(1) (1890) I L. R., 17 Calc., 896.